SUPREME COURT, U. S.

SEP 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

MARVIN E. POLLOCK
Attorney for Appellants
80 Pine Street
New York, N. Y. 10005

Of Counsel:

ALAN H. LEVINE, Esq.
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Questions Presented	4
Statement of the Case	4
How the Federal Questions Are Presented	8
The Questions Are Substantial	9
Conclusion	19
Appendix	
Opinion, Judgment and Dissenting Opinion of Court of Appeals	21
Judgment on Remittitur	35

Table of Authorities

Cases:

Abington School Dist. v. Schempp, 374 U.S. 203 (1962) 15, 17-18

Board of Education of Central School Dist. No. 1. v. Allen, 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791 ..... 2, 16, 17

PAGE

Board of Education of Central School Dist. No. 1 v. Allen, 27 A.D. 2d 69, 276 N.Y.S. 2d 234 2

Board of Education of Central School Dist. No. 1 v. Allen, 51 Misc. 2d 297, 273 N.Y.S. 2d 239 ..... 2, 17

Bowerman v. O'Conner, Jr., Providence Co. Superior Court, Rhode Island, #31775 (1966) 10

Cantwell v. Connecticut, 310 U.S. 296 (1940) 12, 18

Cochran v. Board of Education, 281 U.S. 370 (1930) 12

Dickman v. School Dist. No. 626, 232 Ore. 238, 366 P. 2d 533 (1962) 10

Engel v. Vitale, 370 U.S. 421 (1962) 15

Everson v. Board of Education, 330 U.S. 1 (1946) ....*passim*

Hass v. Independent School Dist., 69 S.D. 303, 9 N.W. 2d 707 (1943) 10

Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign Cty., Illinois, et al., 333 U.S. 203 (1948) 3, 14, 16

McGowan v. Maryland, 366 U.S. 420 (1961) 3

McCenna, et al. v. Sills, et al., N. J. Super. Ct., Bergen Cty., Chancery Div., Calendar No. C-17-67 15

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 18

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 18

Torcaso v. Watkins, 367 U.S. 488 (1961) 18

Zellers v. Huff, 55 N.M. 501, 236 P. 2d 949 (1951) 10

Zorach v. Clauson, 343 U.S. 306 (1952) 3

PAGE

United States Constitution:

Article IV, Section 4 12

First Amendment ..... *passim*

Fourteenth Amendment 6-7, 8, 12

New York State Constitution:

Article I, Section 3 7

Article I, Section 11 7

Article XI, Section 3 ..... 2, 6, 8

Article XIII, Section 1 5

Statutes and Rules:

28 U.S.C. §1257(2) 3, 19

New York Education Law, as amended L. 1965, C. 320, §2, L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, §701.3 ..... *passim*

Section 306 5

Section 1706 5

Louisiana Rev. Stat. Tit. 17, §351 (1963) 10

Mississippi Code Ann. 1942, Tit. 24, §6656 (1952) 10

Gen. Laws of Rhode Island, 1956, §16-23-2 (Supp. 1965) 10

West Virginia Code Ann. §18-5-21b (1966) 10

Burns Indiana Stat. Ann. 1933, §28-512 (1948) 10

Kansas Stat. Ann. §72-4107 (1964) 10

PAGE

Rules of the United States Supreme Court:

Rule 13(2) 1

Rule 15 1

Other Authority:

National Catholic Welfare Conference, *Summary of Catholic Education 1962 and 1963* (1965) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The Appellants, pursuant to Rules 13(2) and 15 of the Rules of the United States Supreme Court, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinions Below

The majority and dissenting opinions delivered in the Court of Appeals of the State of New York are reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791. Copies of these opinions as well as the final judgment appealed from are set out in the Appendix, *infra,* pp. 21-36. The majority and concurring opinions of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, are reported at 27 A.D. 2d 69, 276 N.Y.S. 2d 234. The opinion of the Supreme Court of the State of New York, Albany County, is reported at 51 Misc. 2d 297, 273 N.Y.S. 2d 239.

Jurisdiction

This appeal is from a final judgment of the Court of Appeals of the State of New York affirming the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (7),* which order reversed the order and judgment of the Supreme Court of the State of New York, Albany County, declaring Section 701, subdivision 3, of the New York Education Law, as amended by Chapter 320 of the New York Laws of 1965 and Chapter 795 of the New York Laws of 1966, 16 McKinney's Consol. Laws of New York, §701.3, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils enrolled in religious schools, in violation of Article XI, Section 3 of the New York State Constitution and the Establishment & Free Exercise Clauses of the First Amendment to the Constitution of the United States (75) and dismissed the complaint (85).

---

* References are to pages of Transcript of Record unless otherwise indicated.

The final judgment appealed from was entered on June 15, 1967 (7). Notice of Appeal was filed with the Supreme Court of the State of New York, Albany County, on August 17, 1967 (1).

The Supreme Court of the United States has jurisdiction to review the judgment by direct appeal under 28 U.S.C. §1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum* v. *Board of Education of School District No. 71, Champaign County, Illinois, et al.*, 333 U.S. 203 (1948); *Everson* v. *Board of Education*, 330 U.S. 1 (1946).

Statute Involved

Section 701, subdivision 3, of the New York Education Law, as amended L. 1965, C. 320, §2; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, §701.3,

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of

the state or are approved by any boards of education, trustees, or other school authorities."

Questions Presented

(1) Whether Section 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils enrolled in grades 7 to 12 of schools wholly or in part under the control or direction of religious denominations, or in which denominational tenets or doctrines are taught, violates the Establishment Clause of the First Amendment to the Constitution of the United States of America?

(2) Whether Section 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys for free loan to pupils enrolled in grades 7 to 12 of schools wholly or in part under the control or direction of religious denominations, or in which denominational tenets or doctrines are taught, violates the Free Exercise Clause of the First Amendment to the Constitution of the United States of America?

Statement of the Case

Prior to 1965, Section 701 of the New York Education Law authorized school boards to purchase textbooks and either sell or rent them to pupils attending public schools. In 1965, by Chapter 320 of the Laws of 1965, Section 701 was amended to provide, effective September 1, 1966, that school boards must purchase textbooks with public moneys and loan them free, not only to pupils attending public schools, but also to pupils enrolled in any private school which complies with the State's compulsory education law. As originally enacted, new Section 701 did not contain any limit either as to the number of textbooks required to

be purchased and loaned or the amount of public money required to be expended therefor. However, it did direct the Commissioner of Education, in addition to the annual apportionment of public moneys pursuant to the Education Law, to apportion to each school district an amount equal to the cost of the textbooks so purchased and loaned, but not more than $10 a pupil. After the initiation of this action, by Chapter 795 of the Law of 1966, the Legislature amended Section 701 again in order to reduce the financial burden imposed on local school boards by the law.

Before taking office, each member of the plaintiff school boards took an oath, prescribed by Article XIII, Section 1 of the New York State Constitution, to support the Constitutions of the United States and the State of New York. Sections 306 and 1706 of the Education Law provide that any school board member who fails to comply with any section of the Education Law is subject to removal from office by the Commissioner of Education. Section 306 of the Education Law also provides that the Commissioner of Education may withhold public moneys from any school district whose school board fails to comply with any section of the Education Law.

There are pupils residing in the plaintiffs' school districts who are enrolled in grades seven through twelve of religious schools which comply with the compulsory education law.

In the view of the plaintiff school boards, new Section 701, as amended ("Textbook Loan Law") was repugnant to both the New York State and United States Constitutions insofar as it applied to pupils attending religious schools. Faced with the choice of either violating their oaths of office

or refusing to implement the law thereby incurring the grave sanctions imposed for non-compliance, on April 29, 1966, the plaintiff East Greenbush school board commenced this action in the Supreme Court of the State of New York, Albany County. The relief sought in the complaint as amended was a judgment declaring the Textbook Loan Law, insofar as it mandated the purchase of textbooks with public moneys for free loan to pupils attending religious schools, in violation of Article XI, Section 3 of the New York State Constitution and the First Amendment to the United States Constitution, and restraining the defendant from implementing the law (29).

The answer, in substance, admitted the facts pleaded in the complaint as amended, but denied the allegations of unconstitutionality of the law. In addition, the answer alleged five affirmative defenses, one of which was that the plaintiff lacked standing to maintain the action (37).

After issue was joined, five parents of pupils who resided in the school district of the plaintiff East Greenbush school board and who were enrolled in a grade from seven through twelve of a parochial school moved for leave to intervene (44). Their motion was granted without opposition and an order of intervention was entered on May 27, 1966 (52). In their answer, the intervenors denied the allegations of the complaint relating to the unconstitutionality of the law and alleged three affirmative defenses. The substance of these affirmative defenses was that to forbid the loan of textbooks to pupils attending religious schools while permitting the loan of such books to pupils attending non-sectarian private schools would be an interference with the free exercise of religion and a denial of equal protection and due process in violation of the First and Fourteenth

Amendments to the United States Constitution and Article 1, Sections 3 and 11 of the New York State Constitution (54).

All parties then moved for judgment (40, 42 and 59). The motions were argued on July 8, 1966. At the time of oral argument, the Board of Education of Union Free School District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, moved to join the action as plaintiff. Its motion was granted and an order was entered to that effect on August 2, 1966 (61).

The Supreme Court, Albany County, by decision dated August 18, 1966, found that the plaintiffs had standing to maintain the action and that the other affirmative defenses were without foundation. It also found that the Textbook Loan Law, to the extent it mandated the purchase of textbooks for free loan to pupils attending religious schools, violated Article XI, Section 3 of the New York State Constitution and both the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution (63). An order and judgment in accordance with the decision was entered on August 30, 1966 (75). On the same day, the defendant and the intervenors filed notices of appeal (79, 81).

On appeal, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, reversed the judgment and order of the Supreme Court, Albany County, and dismissed the complaint (85). Three justices, constituting the majority, decided the appeal solely on the ground that the plaintiffs did not have standing to bring the action (88). Two justices concurred in the result but decided the appeal on the merits (90). They

found first that the plaintiffs possessed the requisite standing to sue and then went on to hold that the Textbook Loan Law did not violate Article XI, Section 3 of the New York State Constitution or the Religion Clauses of the First Amendment to the United States Constitution.

On January 12, 1967, the plaintiffs appealed (83) from the order of reversal of the Appellate Division which was entered on January 6, 1967 (85).

The appeal was argued on March 2, 1967. By decision dated June 1, 1967, the Court of Appeals, by a vote of 4-3, affirmed the order of reversal of the Appellate Division, Third Judicial Department, holding that the plaintiffs had the requisite legal standing to sue and also holding that the Textbook Loan Law did not violate Article XI, Section 3 of the New York State Constitution or the Establishment Clause of the First Amendment to the United States Constitution (13). Remittitur was entered on June 1, 1967 (9) and Judgment on Remittitur was entered on June 15, 1967 (7).

How the Federal Questions Are Presented

The complaint as amended alleged that insofar as it provided for the purchase of textbooks with public moneys for free loan to pupils attending religious schools the Textbook Loan Law violated the First Amendment to the United States Constitution made applicable to the State of New York by the Fourteenth Amendment, and prayed for a declaratory judgment to that effect (29).

The decision of Supreme Court, Albany County was that to the extent it provided for the free loan of textbooks to pupils attending religious schools the Textbook Loan Law

violated both the Establishment and Free Exercise Clauses of the First Amendment (63), and an order and judgment was entered to that effect (75).

On appeal to the Appellate Division, the respondents argued that the Textbook Loan Law did not violate the First Amendment in any respect. The Appellate Division reversed the judgment and order of Supreme Court, Albany County, but did not pass on the federal constitutional questions. The appeal was decided on the sole ground that the appellants did not have standing to bring the action (88).

On appeal to the Court of Appeals, the appellants argued that the Textbook Loan Law violated both the Establishment and Free Exercise Clauses of the First Amendment. The Court of Appeals, after holding that the appellants did have the requisite standing to maintain the action, held that the Textbook Loan Law did not violate the Establishment Clause and made no ruling with respect to the Free Exercise Clause (13).

The Questions Are Substantial

In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the Supreme Court was called upon for the first time to interpret the Establishment Clause of the First Amendment. At issue was a New Jersey statute permitting local school boards to provide transportation for students attending religious schools. While upholding the law, the Supreme Court warned that the law approached the verge of the State's constitutional power.

Even assuming *Everson* represents the current thinking of the Supreme Court, and later cases indicate there is

some doubt it does, the question raised by this case is whether a State may go beyond bus transportation and provide pupils in parochial school with the cost of textbooks. Since textbooks are as essential to education as any other element, the answer to this question will have a wide impact. Depending on the answer, a State will either be prohibited from providing any further aid to parochial school children or it will be permitted to assume the entire cost of parochial school education. It is submitted that once a State is constitutionally permitted to assume the cost of textbooks for pupils in parochial school no basis will thereafter exist for preventing it from assuming the cost of other essential elements of parochial education, such as school supplies, equipment, athletic facilities, libraries, teachers and even school buildings.

In addition to New York, there are now six states with laws permitting textbooks to be loaned to children attending parochial school. La. Rev. Stat. Tit. 17, §351 (1963); Miss. Code Ann. 1942, Tit. 24, §6656 (1952); General Laws of Rhode Island, 1956 §16-23-2 (Supp. 1965),* W. Va. Code Ann. §18-5-21b (1966); Burns Indiana Stat. Ann. 1933, §28-512 (1948); Kansas Stat. Ann. §72-4107 (1964). In three other states, the practice of providing textbooks for parochial school students has been held to violate the respective state constitutions. *Dickman* v. *School District No. 626,* 232 Ore. 238, 366 P. 2d 533 (1962); *Zellers* v. *Huff,* 55 N. M. 501, 236 P. 2d 949 (1951); *Hass* v. *Independent School District,* 69 S.D. 303, 9 N.W. 2d 707 (1943). The Supreme Court has never directly considered whether the Establishment Clause forbids a state from providing such

* There is currently pending a suit to declare this act unconstitutional as being repugnant to the First Amendment. *Bowerman* v. *O'Conner, Jr.,* Providence Co. Superior Court, #31775 (1966).

aid to students in parochial schools. It is one thing to compel taxpayers to contribute to the support of a public school system where children receive their education in an atmosphere free of sectarian influence. It is quite another thing to require them to support a school system in which sectarian influence is a primary consideration.

The magnitude of the problem can be seen by viewing the use of the taxing power to support religious schools against the background of the growth of sectarian education. Private school attendance has increased to such an extent that today there are approximately seven million students, or approximately 1/8 of the school population, enrolled in private schools, most of which are sectarian in character. Between 1952 and 1963 the population of Catholic elementary and secondary schools alone increased by over 59.9% and 90.4% respectively. At the same time, enrollment in public schools increased at a much slower pace. National Catholic Welfare Conference, *Summary of Catholic Education 1962 and 1963* 32, 42 (1965).

In upholding the Textbook Loan Law, the Court of Appeals said that since the books are loaned to pupils there is no intention to aid parochial schools as such. But in the very next breath the Court was forced to admit that nevertheless there are benefits accruing to those schools. This should have put an end to the matter since any indirect aid, no matter how small, is prohibited. The Court, however, was intent on preserving the law. To this end, the Court created a new category of aid called "collateral" aid which in some undescribed way differs from indirect aid. Thus, as if by magic, illegal indirect aid was transformed into legal aid (Appendix, p. 24).

After going through these verbal machinations, the Court of Appeals had no difficulty concluding that loaning books to parochial school students does not establish a religion or constitute the use of public funds to aid religious schools in violation of the First Amendment (Appendix, p. 25). Only one case was cited in support of this conclusion, and that was *Everson*. No other case, either before or after *Everson*, was even mentioned, not even *Cochran* v. *Board of Education*, 281 U.S. 370 (1930), which the appellees had argued was decisive. Evidently, the Court agreed with the appellants that *Cochran* had no application.

In *Cochran*, a number of citizens and taxpayers of Louisiana sued to restrain state officers from spending public funds for the purchase of textbooks for students attending religious schools on the ground that the laws authorizing such expenditure were repugnant to the State Constitution and Article IV, Section 4 and the due process clause of the Fourteenth Amendment of the Federal Constitution. No argument was made that the laws in question violated the First Amendment. Indeed the Supreme Court had not yet determined that the Establishment Clause of the First Amendment was applicable to the States,* nor had it even interpreted the Establishment Clause as it later would in *Everson*. Accordingly, the Supreme Court decided the case on due process grounds alone. All the case stands for then is that a law appropriating money for textbooks for parochial students does not constitute a taking of private property for a private purpose.

It is to be remembered that in *Everson* the Court said that a busing law approached the verge of the State's constitutional power. While a busing law involves aid some-

* Such a determination was made 10 years later in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

what removed from the classroom, aid in the form of free textbooks is intimately connected with the educational process itself. It is possible to read *Everson* as saying that the aid there was constitutionally permissible because all the law did was to provide a safe way to get to school. In short, the law was a safety measure and as such served a valid public purpose. If *Everson* means that and nothing more, it is of no help here. For here, it cannot be argued that the Textbook Loan Law is a safety device. If, however, *Everson* means something more, then guidelines are necessary, without which doubt will continue to persist as to the extent of the State's power to aid students in parochial schools. More than 20 years have elapsed since *Everson*. During that time, there have been substantial changes both in the quality and extent of public and private school education. These changes make it all the more important to come to grips now with the issues raised in this case, for these issues go to the very heart of public education and the principle of separation of church and state.

In his dissent in *Everson,* Justice Rutledge wrote, with prophetic insight:

> "New Jersey's statute sustained is the first, if indeed it is not the second breach, to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran* v. *Board of Education,* 281 U.S. 370, has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision." (330 U.S. at p. 29)
>
> "(A)part from efforts to inject religious training or exercises and sectarian issues into the public schools,

> the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation, whatever their form or special religious function." (330 U.S. at p. 44)

To Justice Rutledge, the prohibition of the Establishment clause was clear.

> "The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." (330 U.S. at p. 33)

Turning to the facts of the case before him, Justice Rutledge argued (and the argument applies with like force to the providing of textbooks) that the primary reason children were sent to parochial school was to receive religious training and teaching. Payment of transportation costs not only helped the children get to school and the parents to send them, but it aided them in this objective and was therefore aid to religion. Any aid to religion, he said, was intended by the framers of the First Amendment to be outlawed as constituting an establishment. He urged the Court to declare that government must be neutral toward religion.

Justice Rutledge's reasoning was again advanced by the *Everson* dissenters in *McCollum* v. *Board of Education*, 333 U.S. 203 (1947), but it still failed to win acceptance by one more justice to make it a majority view. The Court nevertheless found that a released time system involved a

utilization of the tax established and tax-supported public school system to aid religious groups to spread their faith and therefore constituted an establishment of religion. In *Engel* v. *Vitale*, 370 U.S. 421 (1962), which involved a challenge to the New York Regent's prayer, Justice Rutledge's views seemingly prevailed. There, Justice Douglas, a member of the *Everson* majority, began his concurring opinion with the flat statement that government financing of religious exercises "is an unconstitutional undertaking whatever form it takes", and he went on to say:

> "My problem today would be uncomplicated but for *Everson* v. *Board of Education*. The *Everson* case seems in retrospect to be out of line with the First Amendment . . . Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy." (370 U.S. at p. 443)

Mr. Justice Douglas had another opportunity to reiterate these views in his concurring opinion in the Bible reading cases, *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 229 (1962), where even the majority seemed to adopt Justice Rutledge's reasoning.

Plainly, doubt has been cast on the precedent value of the majority's reasoning in *Everson* and in turn on the decision itself.* In order to stem the tide of government financing of parochial education, what is needed now is a firm expression from the present court that all govern-

* It is worth noting that a number of cases have been instituted recently with the view of overturning *Everson*. Coincidentally, the most recent one was filed on September 7, 1967 in New Jersey, the state from which *Everson* arose. *McCenna, et al.* v. *Sills, et al.*, New Jersey Superior Court, Bergen County, Chancery Division, Calendar No. C-17-67.

ment aid to religious schools, whatever form it takes, is outlawed.

Justice Kane of the Supreme Court and Justice Van Voorhis of the Court of Appeals both felt that the Textbook Loan Law also raised fundamental questions with respect to the Free Exercise Clause. The law itself provides that the books to be loaned shall be those "which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities." The respondents argued in the courts below that this language means that the same books that are furnished to children attending public schools shall be furnished to children attending private schools.

In his dissenting opinion in the Court of Appeals, Justice Van Voorhis observed that: "the language does not exactly say this." (Appendix, p. 31) But, he said, even putting this doubt aside, the difficulty is that there is no reliable method by which secular and religious textbooks can be distinguished from each other. He noted that respondents conceded in the Court of Appeals that if the books to be loaned were religious tracts, the law would be unconstitutional, whether the books were loaned to the students or to the schools themselves. But how, he asked, does one determine whether a book is religious or secular? Some subjects, such as the physical sciences, are or can be secularized. But what about courses in history, social studies and the like? According to Justice Van Voorhis, one of the primary reasons why pupils are sent to church schools is to be indoctrinated in these subjects with the church point of view. Like Justice Jackson, in his concurring opinion in *McCollum* (333 U.S. at p. 236), he

felt it would be too much to expect that were the church in control of public school instruction, it would not select textbooks which present the church point of view on these subjects.

Justice Kane and Judge Van Voorhis both expressed the view that since the increased demand for government to assume the cost of textbooks for parochial school students has resulted from financial considerations, it is to be expected that if the State does assume such cost the religious schools will begin to rely upon the assistance of public moneys for textbooks and anticipate this reliance in the preparation of their budgets. As church schools become increasingly dependent on state textbook aid, the Textbook Loan Law will, they say, create and foster a pressure to influence or dominate the selection of books to be used in the public schools, for presumably these books are the same books that are to be used in the parochial schools. Church schools of one persuasion will thus be forced to vie with church groups of other persuasions to insure that their message is the one disseminated throughout the school systems.

The two justices also expressed the concern that if the church schools become dependent on government for textbooks, the government will be in a unique position to control instruction in church schools. Thus, church schools may well find themselves having to accept textbooks which are offensive to them (51 Misc. 2d at p. 303; Appendix, p. 33). It is just this sort of compulsion that the Free Exercise Clause was designed to prohibit. As Justice Clark said in *Abington School Dist.*:

> "The Free Exercise Clause . . . withdraws from legislative power . . . the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by the civil authority" (374 U.S. at p. 222).

The Textbook Loan Law makes control of the authority empowered to select the books the goal of every church interested in the survival and extension of its own school system. Those opposed to church involvement in education have a like stake in control. Whichever group prevails will have the power to use state machinery to interfere with the free exercise of religion by the losers. Viewed in this light, the Textbook Loan Law operates no differently than the laws considered in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), *Torcaso* v. *Watkins,* 367 U.S. 488 (1961) and *Scherbert* v. *Verner,* 374 U.S. 398 (1963), and should be condemned for the same reasons.

CONCLUSION

For the reasons heretofore stated, it is respectfully submitted that this Court has jurisdiction of this appeal under 28 U. S. C. §1257(2).

Respectfully submitted,

MARVIN E. POLLOCK
Attorney for Appellants

ALAN H. LEVINE, Esq.
Of Counsel